

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARKELL MARSH,

Defendant-Appellant.

UNPUBLISHED

October 30, 2003

No. 241280

Wayne Circuit Court

LC No. 01-012195

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree felony murder, MCL 750.316(1)(b), and felony-firearm, MCL 750.227b(1). Defendant was sentenced to life imprisonment for his murder conviction and the mandatory consecutive two-year term for felony-firearm. We affirm.

Defendant first argues that the trial court erred when it allowed the jury to hear a key witness' preliminary examination testimony in lieu of the witness' live testimony. We disagree. We review for an abuse of discretion a trial court's decision to substitute live testimony with prior testimony. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

According to MRE 804(b), the trial court may generally admit a witness' prior testimony if the witness is "unavailable" for trial. Under MRE 804(a)(5), a prosecutor's witness is not "unavailable" in a criminal case unless the prosecution shows that it exercised "due diligence" in trying to obtain the witness' attendance. Defendant argues that the trial court abused its discretion when it found, without a hearing, that the prosecutor exercised due diligence in procuring its key witness.

We consider all the relevant facts and circumstances to determine whether the prosecution took reasonable, good-faith measures to procure a witness' attendance. *Bean, supra*, at 684-685. Here, the prosecution showed that the witness was due to receive a reduced sentence on other crimes and immunity in this case in exchange for his testimony. Therefore, the witness had a strong incentive to attend the trial. Also, the witness consistently attended prior hearings despite being out on bond, and he did not pose a flight risk until a prosecutor in a different county brought new charges against him. The prosecution immediately obtained a warrant for the witness' arrest when it learned that the new charges might prevent the witness' voluntary appearance at trial. Prosecutors also maintained contact with the witness through his phone calls

to them. The prosecution obtained a federal warrant and involved a federal marshal in the case, who traced the witness' phone calls. Based on these facts, the trial court did not abuse its discretion when it found that the prosecution exercised due diligence.

Furthermore, in *People v Starr*, 89 Mich App 342, 347; 280 NW2d 519 (1979), we suggested that prosecutors recite, on the record, whatever measures the prosecution and police took to procure the absent witness' attendance. Because the prosecutor employed that method below, we do not find that the trial court abused its discretion by failing to hold a full evidentiary hearing especially when none was requested.

Next, defendant argues that the trial court erred when it allowed a witness to testify regarding intimidating statements defendant made to him. We disagree. We generally review for an abuse of discretion a trial court's decision to admit evidence. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). While a defendant's intimidating statements to witnesses may appear to fall under the exclusion of other-acts evidence found in MRE 404(b), we have held that a defendant's attempts to dissuade a witness from testifying relate directly to the defendant's knowledge of guilt. *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Because a party may introduce other-acts evidence for any legitimate reason unrelated to character, *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990), the trial did not abuse its discretion when it allowed the testimony here.

Defendant next argues that the trial court erred when it disallowed evidence regarding a witness' prior second-degree murder conviction. We disagree. We review for an abuse of discretion a trial court's decision to admit other-acts evidence. See *People v Sabin*, 463 Mich 43, 66; 614 NW2d 888 (2000). Defendant candidly admitted below and on appeal that he wanted to introduce the prior conviction because it supported his defense theory that the witness, rather than defendant, murdered the victim. However, MRE 404(b)(1) does not permit a party to use an individual's prior crime to demonstrate the likelihood that the individual committed the instant crime, and we have held that MRE 404(b)(1) relates to the other acts of witnesses as well as defendants. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). Furthermore, defendant did not demonstrate that the witness' earlier murder conviction involved an element of theft or dishonesty that would allow defendant to impeach the witness with it under MRE 609. Because MRE 404(b)(1) excludes the use of other acts for defendant's proposed purpose, the trial court did not abuse its discretion.

Finally, defendant argues that the trial court erred when it precluded his private investigator, Gerald Borycz, from testifying about an inconsistent statement that a dismissed witness, Ronald Pringle, allegedly provided to him in a private interview before trial. We disagree. While, in *People v Parker*, 230 Mich App 677, 682-683; 584 NW2d 753 (1998), this Court recognized that MRE 613(b) relaxed the traditional requirement that a party must present impeaching prior-statement evidence to a witness *before* the party may introduce it, nevertheless, "the traditional method of presenting the alleged inconsistent statement to the witness on cross-examination is still preferred." *Id.* at 683. A defendant who fails to follow the traditional method of presentation on cross-examination risks a trial court's discretionary ruling that the

defendant cannot admit the evidence. *Id.* at 684. Defendant here knew about Pringle's contradictory statement before Pringle testified but failed to present it during Pringle's cross-examination or request that Pringle be subject to recall. See *id.* at 683, n 2.¹ Therefore, because retrieving Pringle from prison would have necessarily required delaying trial, and defendant failed to offer any valid excuse for having failed to either cross-examine Pringle regarding the statement or request that he be subject to recall, the trial court did not abuse its discretion when it disallowed Borycz's testimony regarding Pringle's inconsistent statements.²

We affirm.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Pat M. Donofrio

¹ We further note that defense counsel had told the court the day before that he would not be calling any witnesses.

² As the trial court observed, if not properly admitted as impeachment, the proffered testimony was inadmissible hearsay; Pringle's interview statement was not given under oath at a court proceeding or in a deposition. MRE 801(d)(1)(A).